

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

** PLEASE RETURN TO **
** RECORDS ROOM **

77-1319

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - x

To be argued by
Richard A. Greenberg

UNITED STATES OF AMERICA, :

Appellee, :

-against- :

Docket No. 77-1319

NANCY REED, :

Appellant. :

- - - - - x

B
R/S

BRIEF FOR APPELLANT NANCY REED

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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STATUTES INVOLVED

21 U.S.C. § 878

Any officer or employee of the
Bureau of Narcotics and Dangerous
Drug designated by the Attorney
General -

- (1) carry firearms;
- (2) execute and serve search

warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;

- (3) Make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;
- (4) Make seizures of property pursuant to the provisions of this sub-chapter; and
- (5) perform such other law enforcement duties as the Attorney General may designate.

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibited Appellant Reed's warrantless arrest made within her home and without exigent circumstances.

2. Whether, pursuant to Rule 28(i), F.R.Ap.P., Appellant Reed adopts any factual statement or legal argument made by co-appellant Goldsmith which is not consistent with Appellant Reed's interests on this appeal.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Frederick van Pelt Bryan) entered on July 20, 1977, after a jury trial, convicting Appellant Nancy Reed of conspiracy to distribute and distributing approximately 122.65 grams of heroin in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(a)(1)(A), and 846. Appellant was sentenced to two concurrent six-year terms of imprisonment, execution of which was suspended, and she was placed on probation for a period of five years.

Appellant remains free under probation supervision pending appeal, and Robert S. Markfield was continued as counsel on appeal by this Court pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Appellant Nancy Reed, a New York Telephone Company employee for eight years who had no prior criminal record (452, 514),* and Morris Goldsmith, who lived with Appellant

*Numbers in parentheses refer to pagination in the minutes of trial commencing June 8, 1977.

from time to time and was the father of Appellant's fifteen-year old daughter (452), were indicted (77 Cr. 273)* in the Southern District of New York on charges of conspiring to distribute heroin (Count One), and distributing a total of approximately 343 grams of heroin on September 10 (Count Two), September 23 (Count Three), and September 30, 1976 (Count Four). After pretrial hearings were held,** Appellant and her co-defendant were tried together before The Honorable Frederick van Pelt Bryan and a jury, the proceedings commencing on June 8, 1977. While both Appellants were found guilty by the jury on June 15, 1977 of Counts One and Two, the jury was unable to reach a verdict as to Counts Three and Four, and the Court declared a mistrial as to those Counts (714). On July 20, 1977, Appellant Reed was sentenced to a five-year term of probation after execution of concurrent six-year terms of imprisonment was suspended, and her co-defendant received concurrent four-year terms of imprisonment with a three-year

*The indictment is "B" to Appellant's separate Appendix.

**The pretrial hearings, held on June 7, 1977, were based on Appellant's motion to dismiss the indictment because of the government's failure to produce the confidential informant who was deeply involved in the case, and on Appellant Goldsmith's motion to suppress written and oral statements he gave to the government after his arrest. The Court denied both motions.

term of special parole to follow confinement.

The Trial

The government's case against both Appellants depended largely on the testimony of Garfield Hammonds, an undercover agent employed by the Drug Enforcement Administration ("DEA"). Hammonds had been introduced to Appellants by a paid confidential informant named Adeliouis McCray, who was concededly "on the set" during all three substantive transactions for which Appellants were indicted (220) and was also involved in the negotiations that led up to the actual transactions. McCray, who had a criminal record, received over \$7,000 for his services as an informant (286-292, 298, 329). Several months before trial, however, McCray disappeared and could not be located by the government despite efforts to do so (295-298, H. 40-50).^{*} Appellant Reed's defense was that McCray had entrapped her, and Appellant Goldsmith raised the additional defense that he was merely a "messenger" and not involved in any drug conspiracy (616).

^{*}"H" refers to pagination in the minutes of the pretrial hearings of June 7, 1977.

A. The Government's Case

Agent Hammonds testified in pertinent part as follows:

On the evening of September 9, 1976, he drove to McCray's apartment in the Bronx where McCray gave him a small sample of heroin (Govt. Ex. #1) (33-35). The two men then drove in McCray's car to 1380 University Avenue in the Bronx. Leaving Hammonds in the car, McCray entered the premises and returned in ten minutes, followed soon after by Appellant Goldsmith (36). McCray introduced Hammonds as "G.G." and Goldsmith as "Marlowe" (36). Goldsmith told Hammonds that "Nancy was upstairs . . . getting ready to go get the package for us" (37). Hammonds told Goldsmith that he wanted an 1/8 kilogram of heroin which Goldsmith said would cost \$6,500 (37). Goldsmith told Hammonds that the agent would have "to advance the money to Nancy because she would need money to pick up the package" (37). Appellant Reed then approached the car and was introduced as Nancy while Hammonds was again introduced to her as "G.G." (38). Upon being told by Reed that she needed the money to pick up "the package", Hammonds told her to enter McCray's car where he gave her \$6,500 (39). Appellant Reed said she would return in an hour. Before departing, she asked Hammonds "how was the

sample" McCray had given him, and assured him that the "package" he was to receive would be of the same quality (39). Reed then departed, Goldsmith went back inside the apartment building, and McCray and Hammonds were left to wait for Reed's return (39-40). Two or three hours later, at midnight, while McCray was absent making a phone call, Goldsmith returned to the car and withdrew from his waistband a brown paper bag containing an 1/8 kilogram of heroin (Govt. Ex. #2) which he gave to Hammonds (41, 42). After picking up McCray, Hammonds drove back to the DEA office where the agent field tested the narcotics (44-45).

Hammonds' next contact with Appellants was on September 23, 1976. The agent directed McCray to call Reed's apartment on that day, and monitored the conversation (46). McCray told Reed that Hammonds, or "G.G.", was back in town and "wanted to get another thing" (46). Reed said that McCray should call back in 15 minutes when Marlowe would be home. When McCray called back, Goldsmith told him that "everything was set up" and to turn over the money as quickly as possible to facilitate the transaction (46). Goldsmith quoted a price of \$5,750 for another 1/8 kilogram of heroin (47). McCray

and Hammonds then drove in McCray's car to Reed's apartment, and met Appellants outside (47-48). Goldsmith approached the car and told Hammonds that it would take another hour to "get the package together" and that McCray and the agent should go somewhere and wait (48). The informant and the agent drove to the New Bridge bar in the Bronx, where McCray was instructed to call Appellant Reed and inform her of where they were waiting (48a). When Appellants arrived at the bar, Reed told Hammonds that Goldsmith had quoted the wrong price, that \$5,750 was what she would pay her source, but that it did not cover her fee. She asked instead for \$6,300 (49). While McCray and Goldsmith remained in the bar, the conversation between Hammonds and Reed was continued in the car outside, during which Reed suggested that the two of them should deal on a "one-on-one basis" and "cut out" Goldsmith (51). Hammonds agreed with her, gave her \$6,300 in cash, and went back to the bar to wait, while both Appellants drove off (51). Sometime later, Appellants returned to the bar and Reed told Hammonds that "everything went okay. The package is good" (52). Hammonds then secured McCray's keys to his car, gave them to Reed, and told her to put the package in the informant's car,

which Hammonds observed her to do (52). Reed returned with the keys, said good-bye, and left with Goldsmith (52-53). The agent and McCray returned to McCray's car, drove to the DEA office, and field tested the drugs which Appellant Reed had left in the glove compartment (53). The package, containing approximately 1/8 kilogram of heroin, was received in evidence as Govt. Ex. #3 (53).

The third and final transaction occurred on September 29, 1977. On that day, McCray drove Hammonds back to the New Bridge bar where they met Appellants (54-55). Hammonds complained to Reed about the poor quality of the last purchase he had made, and Reed informed Goldsmith of that fact (55-56). Hammonds and Reed continued their discussion in the car parked outside, during which Reed tried to persuade Hammonds to buy a kilogram in order to assure better quality (57). Reed said she had a white "connection" in New Jersey named Paul Levy who was very reliable and to whom she had introduced her cousin, "P.T.", for the purpose of buying two kilograms of heroin (60). Reed promised to try and arrange such a transaction for Hammonds during the first week of October (61). Hammonds then gave her \$6,500 for the heroin

he had come to purchase that night (62). Reed picked up Goldsmith, who was waiting in the bar, and the two of them left together (62). McCray and Hammonds waited in the bar until midnight when both Appellants returned (63). This time, Goldsmith accompanied Hammonds to McCray's car, where Goldsmith gave the agent a package, promising Hammonds to get him better quality narcotics from Reed's white connection (63-64). The package which Hammonds received that night (Govt. Ex. #4) contained another 1/8 kilogram of heroin (71-72). Before parting company, Reed promised Hammonds "to hook him up with my guy Paulie" (70-71).

Over the next two months, Hammonds continued to negotiate with Reed in an unsuccessful attempt to purchase a kilogram of heroin for \$100,000 from Reed's "connection", Paul Levy (73-110). During the course of the negotiations, Hammonds tape recorded four telephone conversations he had with Reed, and transcripts of those conversations were introduced at trial (Govt. Ex. ##11-14).^{*} Hammonds' last contact with Reed occurred on December 6, 1976, when he and McCray went to Reed's apartment, 14J, at 1380 University

^{*}The transcripts of the conversations are found collectively as " F " in Appellants' separate joint Appendix. The language used in the transcripts is largely unintelligible, and required Hammonds' uncorroborated explanation of what various terms meant (81-95).

Avenue. At that time, Reed gave Hammonds a small sample of heroin (Govt. Ex. #5), which she said came from a source named Crowley (109-111).

Another DEA agent, Richard Bell, testified as to the surveillance he conducted during the September 23 and September 29 transactions, generally corroborating Hammonds' testimony as to the movements of the parties on those dates (226-236). However, there was no other testimony presented by the government which corroborated Hammonds' account of the negotiations which led up to the actual transactions.

The Arrest

On the morning of February 23, 1977, both Appellants were arrested without a warrant in Appellant Reed's apartment by three DEA agents (411-412). Two address or telephone books belonging to Appellant Reed were seized at that time, and while the originals were subsequently returned to Appellant Reed, the government introduced at trial Xeroxed copies of those address books (Govt. Ex. ##6-7).^{*} The address books contained the names of unindicted co-conspirators, including

^{*}The address books are found at " E " of Appellant's Appendix.

"Crowley", "P.T.", and "Pauli" (242).

Counsel for Reed moved to suppress the address books on several grounds (277-281), including his contention that the warrantless arrest was unlawful:

"Your Honor, at this time we would want a probable cause hearing as to the basis of the arrest. There were no exigent circumstances here and he didn't have a warrant to arrest these people . . . There were no reasons why they couldn't get an arrest warrant and search warrant. They went there to search and arrest." (412)

Apparently counsel had not known of the existence of copies of the address books or of the government's intention to offer them into evidence before the government actually did so during trial. As counsel for Reed stated:

"/Had we known about it /the address books we would have moved to suppress prior to the trial." (243)*

*The prosecutor asserted that Appellant had never made a demand for the documentary or physical evidence the government intended to introduce at trial (244). Counsel for Reed reminded the prosecutor that "You and I had a discussion yesterday about Rule 16 /in which you also said to me you would turn over all Rule 16 if I would turn over all Rule 16" (244-245). The Court stated that:

"I am a little distressed that the United States Attorney did not turn those documents over to the defendants at the time that they had a general exchange of documents. I see no reason why that /the address books should not have been turned over . . . I want to say to you, Mr. Mazur, that when you are doing an

While no hearing was held specifically addressed to the question of the warrantless arrest, the manner in which the arrest was effected and the address books seized was disclosed during trial and pretrial hearings. Piecing together the testimony of Agents Bell and Harvey Tuerack, both of whom testified at the hearings and at trial, the following government version of the arrest and seizure emerges:

At approximately 7:30 on the morning of February 23, 1977, four DEA agents (Bell, Tuerack, Jordison, and Aponte) met in the vicinity of Appellant Reed's apartment at 1380 University Avenue in the Bronx(236, 360, 393). Tuerack testified that he at least sat in his parked car outside the premises for five or ten minutes (H. 128). At 7:45 a.m., leaving Agent Aponte on the street (360), Bell, Tuerack and Jordison proceeded to Appellant Reed's apartment on the 14th floor and either rang the bell or knocked (236-237, 360, H. 100-101). Appellant Reed opened the door in her negligee (237, 241, 360). Bell denied that his gun was drawn, but was "not absolutely sure" whether the other agents had drawn their

(Fn. Cont'd):

exchange like that with the defendant, don't try and withhold anything and be a little smart about it. You ought to have given it to them . . . that doesn't make any sense at all. I don't want you to do that again . . ."

(281-283)

guns (241). Tuerack admitted that "I had my hand on my weapon as I went through the door" and his weapon "may have been" visible to Reed as she stood by the door (394). Tuerack did not notice if Bell or Jordison had drawn their guns (394). Agent Bell described what happened next:

"When I identified ourselves as agents of the DEA, we were admitted to the apartment. Ms. Reed opened the door, I believe, and we told her that . . . we were arresting her and Mr. Goldsmith . . . Ms. Reed was in the living room or the dining area and with a tall female child subsequently identified as Ms. Reed's daughter. We explained to her who we were again. I placed Ms. Reed under arrest, and at that time I gave her her rights . . ."
(237)

Agents Tuerack and Jordison went into the bedroom where they woke Goldsmith, who was sleeping, and arrested him (360).

After arresting Reed, Agent Bell noticed an open address book on a telephone table. Recognizing the name of a drug dealer in the open book, Bell asked Reed if it was her telephone book. When she responded that it was, Bell said, "Well, I'm going to take it", to which Reed responded, "Take it" (238, 268-71).*

*Appellants gave a somewhat conflicting version of the arrest in testimony held outside the jury's presence or at the hearing. Appellant Reed denied she had given Bell permission to take her address book, but rather he had seized them even before her arrest (275-276). Appellant Goldsmith testified that he awoke with the agents pointing two guns to his head (H. 165-166).

The Court denied on the merits Reed's motion directed to the warrantless arrest. It did so first on the basis of 21 U.S.C. § 878:

"Before we do anything else, let's dispose of this question about warrantless arrests that you just raised. I don't know whether you are familiar with 21 U.S. Code, Section 878, which provides that any employee [of the DEA] may, (3) [sic], make arrests without a warrant for any offense against the United States committed in his presence or, B, for any felony recognizable under the laws of the United States if he has probable cause to believe that the person to be arrested has committed a felony.

"I don't see what the warrantless arrest has to do with it." (417)

Subsequently, the Court reaffirmed its decision by relying on two recent Supreme Court cases, United States v. Watson, 423 U.S. 411 (1976), and United States v. Santana, 427 U.S. 38 (1976), and concluded that:

"Our original thinking on that question is correct, since the entry of Miss Reed's partner [sic] was admittedly after she was arrested in full view when she opened the door. Such a warrantless arrest was clearly authorized by 21 U.S. Code 878 and my prior ruling on this question stands." (431)*

*The Court's decision on this issue is found at "D" to Appellant's Appendix. The Court also denied Appellant's motion to suppress the telephone books on the additional ground that the books were seized in "plain view" and would have had evidentiary value at the time they were seized (283-284, 416-417, 428). Since it held no hearing specifically directed to the issue of the warrantless arrest, but ruled instead on

After admitting the two address books in evidence (285), the Court instructed the jury that they were to be considered only against Reed and not against Goldsmith (285), and repeated that instruction in its charge (653-654).

In his summation, the prosecutor told the jury:

"When considering the case against Nancy Reed, take a look at her address books. There are some interesting numbers in these address books. P.T.'s telephone number, Pauli's telephone number, and you'll find James Crowley's telephone number. James Crowley, who is supposedly Goldsmith's source, is in Nancy Reed's address book." (594)

Later, after defense summations, the prosecutor adverted to the address book again:

"Mr. Markfield says that the Paul Levy deal is a figment of somebody's imagination. That telephone number in the address book isn't a figment of anybody's imagination. It is there several times in both books." (627)

During the jury's deliberations, they returned with a request for, among other things, Reed's telephone books, which the Court gave them (679, 691).

Continuing with the trial testimony, Agents Hammonds and Tuerack testified to oral statements Reed and Goldsmith

(Fn. Cont'd):

the question as a matter of law, it had no occasion to resolve the conflicts in the government's and defendants' versions of the arrest.

made at DEA headquarters after their arrest. As to the transactions for which Reed was subsequently indicted, she told the agents that "McCray had come to her and Goldsmith asking that she secure narcotics for someone McCray knew. She told the agents that the first and third packages given to Hammonds came from a source named Crowley, and that the second package came from someone named "Little Billy"", both of whom were actually Goldsmith's sources (115, 366-367). Hammonds also claimed that Reed told him that she had "connected" her cousin "P.T." with Paul Levy, enabling her cousin to purchase from Levy two kilograms of heroin (115).

After talking with the agents, Reed was interviewed by an Assistant United States Attorney to whom she gave a signed statement which was introduced in evidence (Govt. Ex. #8) (375).* The statement, which reflected the Assistant's synopsis of their conversation (374), generally repeated the oral statement she made to the agents (381-382) and indicated that while she received approximately \$700 for the first two transactions, she gave \$100 of the proceeds to McCray.

The government thereupon rested its case (429).

*The statement is " G " to Appellant's Appendix.

B. The Defense Case

Appellant Reed called two witnesses in her behalf and testified herself. Goldsmith put on no defense.

Appellant Reed's witnesses included Helena Taylor Allen, a co-worker of Appellant's at the phone company, who testified that Appellant was liked on the job, and that she had never seen Appellant use or sell narcotics. She had also dated McCray, whom she had visited once in jail. In 1976, McCray had beaten Allen up, causing her to bring charges against him in Bronx Criminal Court (432-445).

Testifying in her own behalf, Appellant Reed admitted some involvement in the three transactions which Agent Hammonds had described. She testified, however, that she was induced and pressured to participate by McCray. In summary, her account was as follows:

McCray, whom Reed had known for several years, was constantly in need of money and continually begged her to help him. Eventually, McCray introduced her to Hammonds and told her that Hammonds was "a dumb country dude from down South" who could help McCray if McCray could supply Hammonds, or "G.G.", with narcotics. McCray proposed that Reed seek

narcotics for him from Paul Levy, whom Reed had known "on the avenue" when she was younger. When Reed refused, McCray attempted to persuade Goldsmith to find a source of narcotics for him. Finally, Goldsmith succumbed and arranged for Reed to secure a package of narcotics for "G.G." through someone Goldsmith knew. McCray continued to call Reed and Goldsmith, pressuring them to make other deals, which resulted in the second transaction. After that transaction, McCray complained to Reed about the quality of drugs that had been provided "G.G.", and, by scaring her, succeeded in persuading Appellants to obtain the narcotics in the third transaction, which were secured through Goldsmith's contact named Crowley. Reed explained her tape recorded conversations with Hammonds as the result of McCray's instructions to lead "G.G." on, to "just tell him anything" because G.G. "didn't know that much about it anyway." On the last occasion Reed saw McCray and Hammonds, she gave McCray a sample of heroin as she had been instructed to do by Goldsmith (451-488).

On cross-examination, Reed denied she had told Hammonds she wanted to "cut out" Goldsmith (494), and denied that she had introduced her cousin, P.T., to Paul Levy (495).

At the conclusion of Reed's testimony, the defense rested.

After summations and the Court's charge,* the jury began its deliberations at 2:00 p.m. on June 14, 1977 (678). They returned the same day with a request for "1) list of indictment, 2) telephone books, 3) transcript of telephone conversations, 4) rights card, 5) summary of judge (if possible)" (679). After the Court complied with their request (685-694), the jury continued their deliberations, only to return yet again with the question, "Is there any evidence indicating who made pickup of the drugs from the main source in each case of drug transaction?" (692, original emphasis). The Court told the jury that it could not answer that question for them and that they must decide it for themselves from their recollection of the testimony (699-700). The jury returned to their deliberations, but were later excused for the night (702). At 12:30 p.m. on the following day, June 15, 1977, after deliberating from 9:45 a.m., the jury sent a note to the Court, stating "At this time the jury has examined the facts in the case and finds that it cannot come to a unanimous decision"(703). Upon questioning by the Court, however, it

*The Court's charge to the jury is "C" to Appellant's Appendix.

was subsequently disclosed that the jury had reached a guilty verdict on the conspiracy and first transaction (Counts One and Two) as to both Appellants, but were unable to reach a verdict on the last two transactions (Counts Three and Four) (707-711). The Court declared a mistrial as to those Counts and dismissed the jury (714).

ARGUMENT

POINT I

THE FOURTH AMENDMENT PROHIBITED APPELLANT REED'S WARRANTLESS ARREST MADE WITHIN HER HOME AND WITHOUT EXIGENT CIRCUMSTANCES.

Two and a half months after her last contact with DEA agents, Appellant Reed was arrested without a warrant while she was inside her own apartment by three DEA agents who entered the premises upon Appellant opening her door in response to their knock. Even assuming that the agents who arrested her had probable cause to do so, their failure to obtain a warrant where exigent circumstances were absent violated the Fourth Amendment's warrant requirement. Accordingly, the District Court erred in refusing to grant Appellant's midtrial motion to suppress copies of her telephone books which were seized incident to her arrest.* Because the telephone books were a particularly damaging piece of evidence at

*Appellant's failure to move prior to trial to suppress the telephone books, as normally required by Rule 12(f), F.R.Cr.P., was not deemed a waiver of the objection by the trial court and should not be so considered by this Court. The prosecutor had failed to disclose to Appellant, pursuant to Rule 12(d), F.R.Cr.P., the fact that he intended to introduce at trial a Xeroxed copy of Appellant's telephone book, despite an apparent oral understanding between counsel that all discoverable evidence under Rule 16, F.R.Cr.P., would be turned

Appellant's closely contested trial, Appellant's conviction must be reversed and a new trial ordered.

A. The Arrest

We start with the proposition that:

"[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable

(Fn. Cont'd):

over by both sides. Thus, defense counsel did not know the telephone book would be introduced at trial until the government did so. As counsel indicated, "[H]ad we known about it we would have moved to suppress prior to the trial." In view of the government's lassitude, it is small wonder that the experienced trial judge was "a little distressed that the United States Attorney did not turn those documents over to the defendants at the time they had a general exchange of documents." Accordingly, the Court ruled on the merits of Appellant's motion to suppress, without objection by the prosecutor, and thus there is nothing to preclude this Court from ruling on the merits as well. In circumstances even less compelling than those present in this case, Appellate Courts have considered such issues on the merits despite failure to raise them prior to trial. United States v. Grant, 462 F.2d 28, 32 (2d Cir. 1972); United States v. Milder, 459 F.2d 801, 802 (8th Cir.), cert. den. 409 U.S. 851 (1972); United States v. Gougis, 374 F.2d 758, 761-62 (7th Cir. 1967). In the event this Court finds that the record is inadequate to determine the issue of the warrantless arrest, at the very least the case should be remanded to the trial court for hearing to make such a record. See, Dorman v. United States, 435 F.2d 385, 387 (D.C. Cir. 1970).

cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Fourth Amendment, United States Constitution

Where searches are involved, "[t]here is no more basic constitutional rule in the Fourth Amendment area than that which makes a warrantless search unreasonable except in a few 'jealously and carefully drawn' exceptional circumstances." United States v. Watson, 423 U.S. 411, 427 (1976) (Powell, J., concurring). Thus, the question in this case becomes whether the Fourth Amendment's strict warrant requirement as to searches applies to arrests in the home as well, bearing in mind that:

"[a]n arrest without a warrant by-passes the safeguards provided by an objective determination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest . . . too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, 379 U.S. 89, 96 (1964)

In upholding the validity of the warrantless arrest, the District Court relied on the language of 21 U.S.C. § 878, which gives apparent authority to DEA agents to make such

arrests,* and upon the Supreme Court's recent decisions in United States v. Santana, 427 U.S. 38 (1976) and United States v. Watson, supra. The lower court's reliance on those cases, however, was misplaced.

As this Court recognized in United States v. Jarvis, ___ F.2d ___, Slip op. 4921, 4928 (2d Cir. July 26, 1977), Santana and Watson applied only to warrantless arrests in public places or where exigent circumstances existed; "The Court has not ruled on the validity of warrantless arrests

*21 U.S.C. § 878 provides, in relevant part, that a DEA agent may:

"make arrests without warrant (A) for an offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony."

Because that statute grants authority to arrest, resort to New York law governing arrests is precluded and the arrest here must be determined by federal standards. United States v. Jarvis, ___ F.2d ___, Slip op. 4921, 4928, Fn. 5 (2d Cir. July 26, 1977); Compare, United States v. Swarovski, ___ F.2d ___, Slip op. 3917 (2d Cir. May 31, 1977).

in the home based on probable cause."* Indeed, it is even possible that the instant question has not yet been settled by this Court. In United States v. Berenguer, __ F.2d __, Slip op. 6093, 6099, Fn. 5 (2d Cir. September 22, 1977),

*In Watson, a case in which Justice Stevens did not participate, five members of the Court (Justices White, Burger, Blackmun, Powell and Rehnquist) upheld the validity of the defendant's warrantless, probable cause arrest in a public place, while specifically reserving the question of "whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." 423 U.S. at 418, Fn. 6. Justices Powell and Stewart wrote separate concurring opinions making clear that, in their view, that question was still very much open. Id at 432 - 433. Justices Marshall and Brennan dissented.

In Santana, seven members of the Court upheld, on the basis of Watson, defendant's warrantless, probable cause arrest in her home after she had first been observed in the doorway of her house holding a paper bag shortly after she had been suspected of selling narcotics and had then retreated into her house when the officers accosted her. In a concurring opinion, Justices Stevens and Stewart justified their decision on the basis of exigent circumstances and harmless error. Justices Marshall and Brennan again dissented. Thus, not only has the Supreme Court left open the question in this case, but in view of the concurring opinions of Justices Powell, Stevens and Stewart in Watson and Santana, together with the two dissents in those cases, there is reason to believe that the Court could resolve this issue favorably to Appellant.

decided after Jarvis by an entirely different panel, this Court wrote that "the issue (of warrantless arrests in the home on probable cause) when exigent circumstances are clearly not present has apparently not been faced directly in this circuit." (original emphasis)

If the issue of warrantless, nonexigent, probable cause arrests in the home has not been "directly" decided by this Court, nevertheless, Jarvis and the decisions in other Circuits, as well as general Fourth Amendment standards protecting the privacy of persons in their homes, all dictate the conclusion that Appellant Reed's Fourth Amendment rights were violated.

In Jarvis, supra, defendant was arrested in his home at 1:00 p.m. by FBI agents, armed with a defective warrant, who had learned six days earlier of defendant's identity as a bank robber. After first telephoning Jarvis' home on a pretext to make sure he was there, the agents rang his bell and, when no one answered, entered by breaking the door. This Court held that "the forcible entry into Jarvis' home without a valid warrant in the absence of exigent circumstances

does not meet the requirements of the statute* or Fourth Amendment standards of reasonableness." Slip op. at 4929.

In reaching that conclusion, this Court eschewed any rigid, per se rules for determining when a warrant is required for a home arrest. Instead, it adopted a flexible set of criteria first set forth in Dorman v. United States, 435 F.2d 385, 392 (D.C. Cir. 1970) (en banc), and subsequently adopted by at least four other Circuits. Salvador v. United States, 505 F.2d 1348 (8th Cir. 1974); United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974); United States v. Shye, 492 F.2d 886 (6th Cir. 1974); Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

"These criteria include commission of a grave offense, belief that the suspect is armed, probable cause to believe the suspect has committed the crime, suspicion that suspect is on the premises, likelihood of escape if delay ensues, and peaceful

*The statute in Jarvis, 18 U.S.C. § 3052, is almost identical to 21 U.S.C. § 878, under which the agents here were authorized to arrest Appellant. Thus, the statute here, as the one in Jarvis, must be construed to state "the constitutional standard of the Fourth Amendment." Id at 4927.

entry of the police." United States v. Jarvis, supra, Slip op. 4929*

Under the Jarvis/Dorman criteria, Appellant Reed's arrest cannot be upheld.

1. Gravity of the Offense

In Jarvis, the defendant was suspected of having taken an active part in an armed bank robbery--leaping over the counter and, at gun point, enlisting the aid of a bank employee in removing cash from the tellers' drawers, while his accomplice obtained the bank guard's gun and controlled the public area with it, forcing everyone to lie down on the floor. For his actions, Jarvis was indicted for armed bank robbery (18 U.S.C. §§ 2113(a) and (d)), subjecting him to as much as twenty-five years imprisonment (18 U.S.C. § 2113(d)). Unquestionably, then, Jarvis' crime constituted an extremely "grave" offense.

*Although not expressly adopted by this Court in Jarvis, Dorman established an additional factor to be taken into account--whether the entry is made at night. 435 F.2d at 393. Whether or not the earliness of the hour of entry in this case--7:45 a.m. on a February morning--is sufficiently similar to a nighttime entry to bring it within the policy considerations which make nighttime entries more suspect, the entry in Jarvis was made at a far more auspicious hour (1:00 p.m.). Nevertheless, this Court found the entry unreasonable.

In contrast, Appellant Reed was indicted for conspiracy to distribute and distributing on three occasions a total of approximately 3/8 of a kilogram of heroin, or less than a pound, for approximately \$19,000, subjecting her to at most fifteen years imprisonment (21 U.S.C. §§ 812, 841(a)(1), 841(a)(1)(A), 846). Moreover, the evidence at trial showed her to be at most a "middleman" in a drug distribution business, rather than an "importer" or "source" of drugs herself.

Whether or not Appellant's offense is defined as a "complacent" crime, as the Dorman court used that term (435 F.2d at 392), it was surely one of lesser gravity than the violent bank robbery committed by Jarvis which immediately endangered the lives of innocent citizens.*

2. Belief that the Suspect is Armed

This factor was expressly considered by the Dorman court to bear "materially on the justification for a warrantless entry." Ibid. Yet, unlike Jarvis, who had "brandished" a handgun during the course of the bank robbery, there is nothing in the record here which would give rise to the

*Appellant Reed's sentence of probation at least suggests that the trial judge found her offense something less than "grave".

belief that Appellant or her co-defendant possessed a weapon, and, of course, no weapons were found.

3. Probable Cause

It is conceded that here, as in Jarvis, the DEA agents had probable cause to arrest Appellant.

4. Suspicion that Suspect is on the Premises

While the agents in Jarvis assured themselves of defendant's presence in his home by telephoning beforehand, there is no indication in this record that the agents here were similarly assured or even had "strong" reason to believe that Appellants were present in the apartment. Dorman, supra, 435 F.2d at 393. On the contrary, Agent Tuerack admitted that his surveillance of Appellant's apartment before the entry consisted only of sitting outside in his parked car for five or ten minutes. Thus, as far as the record shows, Appellants could just as easily have been absent from the premises, either because they had spent the night elsewhere or had left the apartment at an earlier hour in the morning.

5. Likelihood of Escape if Delay Ensues

If the six days in Jarvis was sufficient time to

obtain a valid warrant to arrest, as this Court found it was, the two and a half months the agents had here from the date of Appellant's last contact with them on December 6 was a fortiori sufficient time to obtain a warrant. Thus, any argument that speedy action by the agents was necessary to prevent escape should be unavailing.

6. Peaceful Entry

While the agents here did not break the door, as did the agents in Jarvis, neither can it be fairly said that their entry was wholly peaceful. According to the agents' version, three of them entered the apartment after Appellant Reed, dressed in a negligee, opened the door in response to their knock at 7:45 a.m., and arrested her in the living room or dining area in front of her teenage daughter. Moreover, Agent Tuerack admitted that he had his hand on his weapon as he entered, and his weapon "may have been" visible to Appellant Reed.*

*While the agents denied ever actually drawing their guns, Appellant Goldsmith testified that he was awakened by the officers who had two guns pointed at his head. Since the District Court found the warrantless arrest proper without regard to the manner it was effected, it had no occasion to make findings of fact on the issue or to reconcile the

Thus, this is not a case where the agents entered under exigent circumstances through a door already opened before their arrival on the scene. Compare, United States v. Price, 345 F.2d 256, 260 (2d Cir. 1965). Nor is this a case in which the agents were invited to enter. Compare, United States v. Fernandez, 480 F.2d 726, 740 (2d Cir. 1973); 456 F.2d 638, 640 (2d Cir. 1972).*

On the contrary, if the method of entry here did not involve actual physical force, the unexpected appearance at Appellant's door of three male agents, at least one of whom had his hand on his gun, surely conveyed the threat of force.

Assuming, however, that this Court construes the

(Fn. Cont'd):

conflict. In such circumstances, there is no more reason for this Court to credit the agents' version of drawing no guns than that of Appellant Goldsmith who claimed that guns were drawn, particularly since it accords more with common experience that in entering an apartment to make an arrest the agents almost certainly would have drawn their guns.

*Nor does this case bear any substantial similarity to Santana. Here, unlike Santana, Appellant cannot be said to have foresaken any reasonable expectation of privacy by appearing at her street door, visible to the public. Instead she did nothing more than open her apartment door on the 14th floor in response to the agents' knocks, never actually crossing her threshold into the hall. The fact that Appellant was dressed in a negligee further demonstrates an expectation of some modicum of privacy. Finally, Appellant, unlike Santana, was not suspected of having just engaged in a narcotic transaction.

agents' entry as entirely peaceful, nevertheless, under the Jarvis analysis it is simply one of six factors to be considered in determining the reasonableness of Appellant's warrantless arrest. As to four of those factors (gravity of the crime, belief that suspect is armed, presence of suspect on the premises, and likelihood of escape), this case is clearly stronger than Jarvis. As to one factor (probable cause), the two cases are the same. Only with regard to the last factor (peaceful entry) can this case be considered weaker than Jarvis.

In short, unless this Court is now prepared to ascribe overriding importance to the mode of entry, which neither the Jarvis nor Dorman courts did, the balance of criteria in determining the propriety of Appellant's warrantless arrest should tip in Appellant's favor.

Accordingly, as in Jarvis, this Court should hold Appellant's arrest to be violative of the statute (21 U.S.C. § 878) and the Fourth Amendment.

B. Suppression and Reversible Error

Since Appellant's arrest was unlawful (POINT I-A, supra), the copies of the telephone books seized from her

apartment at the time of the arrest must be suppressed. United States v. Edmons, 432 F.2d 577, 584-585 (2d Cir. 1970); cf. United States v. Galante, 547 F.2d 733, 742 (2d Cir. 1976) (Kaufman, C.J., concurring). Those telephone books could not have been obtained except by exploiting the unlawful arrest. Indeed, there is no reason to believe that the agents would ever have known of them had they not entered Appellant's apartment improperly. Thus, this case is distinguishable from Jarvis, supra, where this Court refused to suppress a photograph and palmprint taken of the defendant following his unlawful arrest because that evidence could have been obtained by resort to the simple expedient of arresting Jarvis when he emerged from his house to the street. Slip op. at 4929.*

Because of the improper admission at trial of the address books, Appellant was greatly prejudiced. Those books contained the names of several drug dealers with whom the government claimed Appellant had conspired. It thus provided

*Nor can it be fairly argued that the seizure of Appellant's telephone book was consensual or voluntary. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). While Appellant purportedly told Agent Bell to "take it", that statement was only made after Bell had said, "Well, I am going to take it", and at a time when Appellant was already arrested and in custody. Thus, it should be futile to argue that her consent to seize the phone book was voluntarily given, and certainly the government did not carry its burden of proving that her consent was voluntary.

important corroboration for Agent Hammonds' testimony where otherwise there was little or none. Moreover, the prosecutor relied on the address books in arguing Appellant's guilt to the jury:

"When considering the case against Nancy Reed, take a look at her address book. There are some interesting numbers in those address books. P.T.'s telephone number, Paulie's telephone number, and you'll find James Crowley's telephone number. James Crowley, who is supposedly Goldsmith's source, is in Nancy Reed's address book."

That the jury gave the address books the importance the prosecutor ascribed to them is demonstrated by their request during deliberations to see them, a request the Court complied with.

Finally, the nature of the jury's deliberations demonstrated that the case against Appellant was far from overwhelming. Though the jury began deliberations at 2:00 p.m. on June 14, 1977, they did not return with a verdict until the afternoon of the next day, and only then convicting Appellant of two counts while, on virtually the same evidence, they were unable to reach agreement on the others. In these circumstances, the telephone books unlawfully

seized from Appellant may well have been the factor which persuaded the reluctant jury, or even one juror, to convict at all. Certainly, it cannot be said that the error in admitting them into evidence was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

Accordingly, Appellant's conviction must be reversed and a new trial ordered.

POINT II

PURSUANT TO RULE 28(1), F.R.Ap.P., APPELLANT REED ADOPTS ANY FACTUAL STATEMENT OR LEGAL ARGUMENT MADE BY CO-APPELLANT GOLD-SMITH WHICH IS NOT INCONSISTENT WITH APPELLANT REED'S INTERESTS ON THIS APPEAL.

CONCLUSION

FOR THE ABOVE-STATED REASONS, APPELLANT REED'S CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully submitted,

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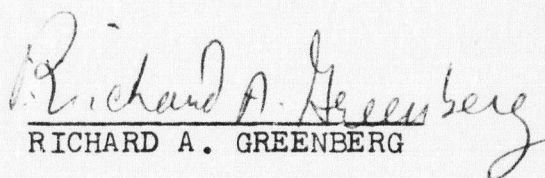
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CERTIFICATION OF SERVICE

Richard A. Greenberg, Esq., an attorney duly admitted to practice in the State of New York, hereby affirms that on October 31, 1977, he served the within brief for appellant Nancy Reed upon Hon. Robert B. Fiske, Jr., attorney for appellee, at One St. Andrew's Plaza, New York, New York 10007, the address designated by him for the purpose, by depositing three true copies of the same in a postpaid, properly addressed wrapper, in an official **depository** under the exclusive care and custody of the United States Post Office Department within the State of New York.

Dated: New York, New York
October 31, 1977


RICHARD A. GREENBERG